

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JUDY ANN PLACENCIA,)
Plaintiff,)
v.)
WORLD SAVINGS BANK, FSB, a/k/a)
WELLS FARGO BANK, N.A., a/k/a)
WACHOVIA MORTGAGE, f/k/a)
WACHOVIA MORTGAGE, FSB,)
Defendant.)
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No. CV-10-1130-HU
**FINDINGS AND RECOMMENDATION
ON MOTION TO DISMISS**

Judy Ann Placencia
32620 S.W. Lake Point Court
P.O. Box 4187
Wilsonville, Oregon 97070

Plaintiff *Pro Se*

Julie M. Engbloom
Pilar C. French
LANE POWELL PC
601 S.W. Second Avenue, Suite 2100
Portland, Oregon 97204-3158

Attorneys for Defendant

HUBEL, Magistrate Judge:

The *pro se* plaintiff Judy Ann Placencia brings this action against the defendant World Savings Bank, now known as Wells Fargo Bank, challenging the nonjudicial foreclosure of real property. The defendant removed the action to this court from Clackamas County Circuit Court on the basis of diversity jurisdiction. The plaintiff filed a motion for remand that was denied by the court.

See Dkt. #38.

The matter is now before the court on the defendant's motion to dismiss the complaint. Dkt. #3. For the reasons discussed below, I recommend that the motion be granted.

BACKGROUND

The plaintiff filed this action in state court on August 17, 2010. Dkt. #1, Ex. 1. The full procedural history of the defendant's service with summons and complaint, and its removal of the case to this court, is set forth in my previous Findings and Recommendation on the plaintiff's motion for remand. See Dkt. #29.

In her complaint, the plaintiff alleges that she was the owner of real property located at 3620 S.W. Lake Point Court, Wilsonville, Oregon 97070. On June 8, 2007, the plaintiff executed a Promissory Note for \$460,000, in favor of World Savings Bank, in exchange for a loan from World Savings Bank to the plaintiff. Under the terms of the Note, the plaintiff agreed to make principal and interest payments every month. See Dkt. #1-1, Complaint.

Also on June 8, 2007, the plaintiff executed a Deed of Trust in her residential property. *Id.*, pp. 19-31. The Deed of Trust was recorded in Clackamas County on June 21, 2007. It identifies

1 the plaintiff as the borrower and World Savings Bank, and its
 2 successors and assigns, as the lender. Wells Fargo Bank is the
 3 successor-in-interest to World Savings Bank. The Deed of Trust
 4 also identifies First American Title as Trustee. *Id.*

5 The plaintiff alleges that at the time she executed the Note
 6 and the Deed of Trust, she believed she was a "borrower," receiving
 7 a "Mortgage Loan" from a "lender," and based on these assumptions
 8 she agreed to pledge her home as collateral for the "Mortgage
 9 Loan." She believed the "Mortgage Loan" would establish a "payment
 10 schedule" based on the amount of the loan and the interest rate.
 11 Dkt. #1-1, Complaint, ¶ 5.

12 She contends it was never truthfully disclosed to her that
 13 this financial transaction, which she understood to be a "Mortgage
 14 Loan," actually was a collection of contracts, agreements, and two
 15 "instruments"; i.e., (1) the Note, which she describes as a
 16 "negotiable financial instrument," and (2) the Deed of Trust, which
 17 she describes as a "security instrument." *Id.*, ¶ 6. She asserts
 18 that the Deed of Trust may be assigned to other parties, "typically
 19 'mortgage servicers' who may exercise those rights, including
 20 collecting payments." *Id.*

21 The plaintiff alleges she was never informed that the Deed of
 22 Trust was a "Trust as defined by section 303(7) of the Trust
 23 Indenture Act of 1939 [as amended through P.L. 111-72, approved
 24 October 13, 2009]." *Id.*, ¶ 7 (brackets in original). She states
 25 that at the time of closing on what she thought was a "Mortgage
 26 Loan," she unknowingly created a "Trust" when she executed the Deed
 27 of Trust, which was prepared by the lender. *Id.*, ¶ 8. She claims
 28 she was the creator and settlor/trustor of the Trust, and the Deed

1 of Trust names First American Title Insurance Company of Oregon as
 2 Trustee of the Trust, transfers her real property into the Trust,
 3 and names the lender as beneficiary. *Id.*

4 The plaintiff purports to quote the definition of "indenture"
 5 from the "Trust Indenture Act of 1939, section 303(7)," and then
 6 alleges that under this definition, the Deed of Trust is not a
 7 contract or an agreement, but is a trust indenture and must be
 8 executed and operated within the guidelines established for the
 9 execution of trusts. *Id.*, ¶ 10.

10 The plaintiff then contends that the lender purposefully
 11 misrepresented facts about the financial transaction, inducing
 12 induced her to create a negotiable financial instrument (the Note),
 13 and to create a Trust using documents prepared solely by the
 14 lender. *Id.*, ¶ 11. As a result, she contends, she unwittingly
 15 conveyed her real property into the Trust, giving First American as
 16 Trustee the fiduciary responsibility to manage the Trust for the
 17 benefit of the lender/beneficiary. *Id.* She asserts that at
 18 closing, the lender received from her as consideration a valuable
 19 negotiable instrument; induced her to create a Trust naming the
 20 lender as beneficiary and First American as Trustee; and convinced
 21 her to convey her home into the Trust. *Id.*, ¶ 12.

22 Based on these allegations, the plaintiff brings the following
 23 causes of action: (1) wrongful foreclosure; (2) fraudulent
 24 misrepresentation; (3) fraudulent concealment; and (4) quiet title.
 25 *Id.*, ¶¶ 25-45. In support of the wrongful foreclosure claim, the
 26 plaintiff contends the defendant is not the legal holder of the
 27 Note and "the security instrument, the Mortgage." *Id.*, ¶ 26. She
 28 contends the March 25, 2010, "Trustee's Notice of Default and

1 Election to Sell Under Terms of Trust Deed," is fraudulent and a
2 legal nullity. *Id.*, ¶ 27. She further contends the defendant
3 lacks standing to initiate and sustain a nonjudicial foreclosure
4 and the August 19, 2010, foreclosure was based on fraudulent
5 documents and is, therefore, wrongful. *Id.*, ¶¶ 28-29. She further
6 contends she is entitled to punitive damages. *Id.*, ¶ 30.

7 In support of her fraudulent misrepresentation claim, the
8 plaintiff alleges the written agreements between herself and the
9 defendant required the defendant to deal with her fairly and in
10 good faith and not take undue advantage of her inferior knowledge,
11 skill, understanding, and experience in regard to this commercial
12 transaction. *Id.*, ¶ 32. She claims the defendant fraudulently
13 misled her into believing she was going to receive a "Mortgage
14 Loan," and the defendant falsely represented the facts regarding
15 the true nature of the transaction and the purpose of the
16 associated documents. *Id.*, ¶ 33. She further contends that as a
17 result of the defendant's intentional fraud, she has suffered
18 damages, which she seeks to recover, and she also is entitled to
19 punitive damages. *Id.*, ¶ 34.

20 As to the fraudulent concealment claim, the plaintiff contends
21 the defendant purposely concealed the fact that the Note was a
22 financial instrument that was negotiable and had value, and
23 defendant purposefully hid the fact that the Note would be
24 deposited and negotiated without any credit to the plaintiff's
25 account. *Id.*, ¶ 36. She contends the defendant purposefully
26 prepared the document and concealed the fact that the Deed of Trust
27 established a Trust with the plaintiff as creator and Trustor,
28 First American as Trustee, and the defendant as Beneficiary. *Id.*,

1 ¶ 37. She alleges the defendant concealed "true facts" about the
 2 Note and the Deed of Trust to induce her to fraudulently convey her
 3 home to the Trust for the defendant's unjust gain, and with no
 4 consideration or compensation to the plaintiff. *Id.*, ¶ 38. Again,
 5 she alleges that she suffered damage and is entitled to punitive
 6 damages. *Id.*, ¶ 39.

7 Finally, in support of the quiet title claim, the plaintiff
 8 contends she is the owner of the real property at issue, and
 9 defendant is enforcing a wrongful foreclosure based on a fraudulent
 10 "Foreclosure Deed." She seeks to quiet title as of the June 24,
 11 2005, Warranty Deed, under which she received title to the
 12 property. *Id.*, ¶¶ 42-44 & Ex. A. She seeks a judicial declaration
 13 that the title to the property is vested in her alone. *Id.*, ¶ 44.

14 The defendant moves to dismiss the entire Complaint for
 15 failure to state a claim for which relief may be granted. Dkt. #3
 16 & #4.

17

18 **STANDARD OF REVIEW**

19 Chief Judge Aiken of this court recently set forth the
 20 standard for the court's consideration of a motion to dismiss in
 21 *Gambee v. Cornelius*, No. 10-CV-6265-AA, 2011 WL 1311782 (D. Or.
 22 Apr. 1, 2011) (Aiken, C.J.). Judge Aiken observed:

23 Under Fed. R. Civ. P. 12(b)(6), a
 24 complaint is construed in favor of the plain-
 25 tiff, and its factual allegations are taken as
 26 true. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629
 27 F.3d 992, 998 (9th Cir. 2010). "[F]or a
 28 complaint to survive a motion to dismiss, the
 non-conclusory 'factual content,' and reason-
 able inferences from that content, must be
 plausibly suggestive of a claim entitling the
 plaintiff to relief." *Moss v. United States
 Secret Serv.*, 572 F.3d 962, 969 (9th Cir.

1 2009). "A claim has facial plausibility when
 2 the plaintiff pleads factual content that
 3 allows the court to draw the reasonable
 4 inference that the defendant is liable for the
 5 misconduct alleged." *Ashcroft v. Iqbal*, 129
 6 S. Ct. 1937, 1949 (2009). "[O]nce a claim has
 7 been stated adequately, it may be supported by
 8 showing any set of facts consistent with the
 9 allegations in the complaint." *Bell Atlantic*
 Corp. v. *Twombly*, 550 U.S. 544, 563[, 127 S.
 Ct. 1955, 1969, 167 L. Ed. 2d 929] (2007).
 "[G]enerally the scope of review on a motion
 to dismiss for failure to state a claim is
 limited to the Complaint." *Daniels-Hall*, 629
 F.3d at 998.

10 *Id.* at *2.

11 A motion to dismiss under Rule 12(b) (6) will be granted if the
 12 plaintiff alleges the "grounds" of her "entitlement to relief" with
 13 nothing "more than labels and conclusions, and a formulaic
 14 recitation of the elements of a cause of action[.]" *Bell Atlantic*
 Corp. v. *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167
 L. Ed. 2d 929 (2007) (internal quotation omitted). "Factual
 15 allegations must be enough to raise a right to relief above the
 16 speculative level, . . . on the assumption that all the allegations
 17 in the complaint are true (even if doubtful in fact) [.]" *Id.*
 18 (citations and footnote omitted).

21 **DISCUSSION**

22 **Judicial Notice of Additional Facts**

23 Defendant asks the Court to take judicial notice of three
 24 documents: (1) Appointment of Successor Trustee, dated March 15,
 25 2010; (2) Trustee's Notice of Default and Election to Sell Under
 26 Terms of Trust Deed, dated March 23, 2010; and (3) Recording Cover
 27 Sheet for Notice of Sale Proof of Compliance, recorded on August 3,
 28 2010, and accompanying documents. The documents are attached as

1 exhibits to the September 24, 2010, Declaration of Pilar French,
2 submitted in support of defendant's Request for Judicial Notice.
3 Dkt. #6.

4 Federal Rule of Evidence 201 governs judicial notice of
5 adjudicative facts. A judicially noticed fact

6 must be one not subject to reasonable dispute
7 in that it is either (1) generally known
8 within the territorial jurisdiction of the
trial court or (2) capable of accurate and
ready determination by resort to sources whose
accuracy cannot reasonably be questioned.
9

10 Fed. R. Evid. 201(b). The court may take judicial notice whether
11 requested or not, but it must take judicial notice if requested by
12 a party and supplied with the necessary information. Fed. R. Evid.
13 201(c), (d).

14 The court may take judicial notice of documents that are
15 matters of public record without converting a motion to dismiss
16 into a motion for summary judgment. *See, e.g., Zucco Partners, LLC*
17 *v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (court may
18 consider judicially noticed documents on Rule 12(b) (6) motion);
19 *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)
20 (district court, when determining whether complaint fails to state
21 a claim, may take "judicial notice of matters of public record
22 outside the pleadings[.]").

23 In 2007, the Supreme Court explained that in ruling on a Rule
24 12(b) (6) motion to dismiss, the may consider "other sources . . .
25 in particular, documents incorporated into the complaint by
26 reference, and matters of which a court may take judicial notice."
27 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322,
28 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007).

1 All of the documents submitted by the defendant are appropriate for judicial notice because they are matters of public record and are publically available. Additionally, the plaintiff expressly refers to the March 25, 2010, Trustee's Notice of Default and Election to Sell Under Terms of Trust Deed, at paragraph 23 of her Complaint. The plaintiff has offered no opposition to the defendant's request that the court take judicial notice of the relevant documents. I therefore grant the defendant's motion to take judicial notice of the documents submitted with the French declaration (Dkt. #6).

11 The documents submitted by the defendant show the following additional facts. Since the time of the original loan, World Savings Bank was acquired by Wachovia Mortgage, which itself was acquired by Wells Fargo. Wells Fargo, N.A. is the successor by merger to Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as Wells Fargo Bank, FSB. Dkt. #6, French Declr. Ex. 1, p. 1.

18 On or about March 15, 2010, the defendant appointed Nancy K. Cary to serve as successor trustee for the Trust Deed. On March 25, 2010, the Appointment of Successor Trustee was recorded in Clackamas County, under Recorder's No. 2010-018167. *Id.*

22 On or about March 23, 2010, the successor trustee executed a Notice of Default and Election to Sell the Property. *Id.*, Ex. 2. The Notice of Default indicated, *inter alia*, that the plaintiff had been in default on the loan since January 2009, having failed to make monthly payments of \$1,983.18, beginning January 2009, through March 2010. *Id.*

1 On August 3, 2010, the successor trustee recorded in the
2 Clackamas County Recorder's Office, under Recorder's No. 2010-
3 046474, a number of documents including an "Affidavit of Compliance
4 with Oregon SB 628." *Id.*, Ex. 3, pp. 13-14. The affidavit states
5 the plaintiff did not respond to the defendant's attempt to offer
6 a loan modification. *Id.* Also with this filing, the successor
7 trustee recorded the requested proofs of service and notices
8 required by Oregon Revised Statutes sections 86.737-86.750. *Id.*
9 The foreclosure sale of the property was conducted on August 19,
10 2010. *Id.*

11 I now will turn to consideration of the defendant's motion to
12 dismiss with regard to each of the plaintiff's claims for relief.
13

14 ***Wrongful Foreclosure***

15 The heart of the plaintiff's wrongful foreclosure claim
16 appears to be that the defendant lacks standing to initiate and
17 sustain a nonjudicial foreclosure, and the August 19, 2010,
18 foreclosure was based on fraudulent documents. The documentary
19 evidence shows, however, that under Oregon's Trust Deed Act, the
20 defendant was permitted to undertake the foreclosure in the manner
21 it did, as outlined in the documents executed by the plaintiff.
22 Further, as explained below, because the plaintiff's fraud-based
23 claims fail to state a claim, she cannot predicate the wrongful
24 foreclosure claim on a claim of fraud.

25 A "trust deed" is a "deed executed in conformity with ORS
26 86.705 to 86.795, [which] convey[s] an interest in real property to
27 a trustee in trust to secure the performance of an obligation owed
28 by the grantor or other person named in the deed to a beneficiary."

1 Or. Rev. Stat. § 86.705(5). A "trustee" is a "person, other than
 2 the beneficiary, to whom an interest in real property is conveyed
 3 by a trust deed, or such person's successor in interest." Or. Rev.
 4 Stat. § 86.705(6). A "beneficiary" is "the person named or
 5 otherwise designated in a trust deed as the person for whose
 6 benefit a trust deed is given, or the person's successor in
 7 interest, and who shall not be the trustee unless the beneficiary
 8 is qualified to be a trustee under ORS 86.790(a) (d)." Or. Rev.
 9 Stat. § 86.705(1).

10 Under the Trust Deed Act:

11 Transfers in trust of an interest in real
 12 property may be made to secure the performance
 13 of an obligation of a grantor, or any other
 14 person named in the deed, to a beneficiary.
 15 Where any transfer in trust of an interest in
 16 real property is made pursuant to the provi-
 17 sions of ORS 86.705 to 86.795 to secure the
 18 performance of an obligation, a power of sale
 19 is conferred upon the trustee. The power of
 20 sale may be exercised after a breach of the
 21 obligation for which the transfer is security;
 22 and a trust deed, executed in conformity with
 23 ORS 86.705 to 86.795, may be foreclosed by
 24 advertisement and sale in the manner provided
 25 in ORS 86.705 to 86.795, or, at the option of
 26 the beneficiary, may be foreclosed by the
 27 beneficiary as provided by law for the
 28 foreclosure of mortgages on real property.

21 Or. Rev. Stat. § 86.710.

22 Thus, the Trust Deed Act allows the defendant to foreclose
 23 through the mechanism of a trust deed because upon breach of the
 24 obligation secured by the deed, the beneficiary may choose between
 25 either a judicial or nonjudicial foreclosure. The Trust Deed Act
 26 specifically authorizes the creation of a trust for the purpose of
 27 obligating the grantor/plaintiff to perform the terms of her loan,
 28 including making monthly payments.

1 In the Trust Deed at issue in this case, the plaintiff
2 expressly agreed to the creation of a trust for the purpose of
3 securing her obligations in the Note:

4 I irrevocably grant and convey the
5 Property to the Trustee, in trust for Lender,
6 with a power of sale subject to the terms of
7 this Security Instrument. This means that, by
8 signing this Security Instrument, I am giving
9 Lender and Trustee those rights that are
10 stated in this Security Instrument and also
11 those rights that the law gives to lenders who
12 are beneficiaries of a deed of trust and to
13 trustees of a deed of trust. I am giving
14 Lender and Trustee these rights to protect
15 Lender from possible losses that might result
16 if I fail to

17 (i) pay all amounts owed to
18 Lender under the Note and all other
19 notes secured by this Security
20 Instrument, called the "Secured
21 Notes," including future advances
22 made by Lender and any changes to
23 the Secured Notes made with the
24 written consent of the Lender[.]

25 Dkt. #1-1, Complaint, Ex. B, p. 2.

26 Additionally, the plaintiff agreed that she had the right to
27 grant a security interest in the property and she promised to pay
28 all principal and interest due under the Note. *Id.*, pp. 2-3.
Finally, the Trust Deed provided that the lender was empowered to
exercise the power of sale if the plaintiff failed to make her
payments or otherwise breached her obligations. *Id.*, p. 9.

29 The plaintiff's initials appear on every one of the twelve
30 pages of the Trust Deed, except for page eleven where her entire
31 signature appears instead of her initials. See Dkt. #1-1, Ex. B.

32 Other than her argument that the transaction was based on
33 fraudulent documents, addressed below, the plaintiff fails to
34 articulate facts showing any basis for her wrongful foreclosure

1 claim. The Trust Deed document she attaches to her Complaint shows
2 that she granted a security interest in the property as collateral
3 for the Note under Oregon's Trust Deed Act. Under the relevant
4 statutes, the defendant had the right to sell the property in a
5 nonjudicial foreclosure, upon the plaintiff's failure to make the
6 payments she was obligated to make. The plaintiff makes no
7 allegation that the defendant failed to follow the proper
8 procedures or in any way failed to comply with the law regulating
9 nonjudicial foreclosures. I recommend that the defendant's motion
10 to dismiss the wrongful foreclosure claim be granted.

11

12 ***Fraudulent Misrepresentation***

13 The gravamen of this claim is that the defendant misrepre-
14 sented to the plaintiff the import of the documents she signed at
15 the time of closing on the loan. She contends the defendant failed
16 to inform her that the Trust Deed created a trust in which she
17 granted the property for the purpose of securing her performance on
18 the Note. The defendant argues this claim is time-barred, fails to
19 comply with the pleading requirements of Federal Rule of Civil
20 Procedure 9(b), and in any event, is inconsistent with the facts as
21 demonstrated by the actual loan documents. I agree with the
22 defendant.

23 A fraud claim must be commenced within two years from the
24 discovery of the fraud or deceit. Or. Rev. Stat. § 12.110. A
25 plaintiff "discovers" fraud when the plaintiff knew or should have
26 known about it. *Bell v. Benjamin*, 232 Or. App. 481, 485-86, 222
27 P.3d 741, 743-44 (2009). The "knew or should have known" analysis
28 has two steps: (1) it must appear that the plaintiff had sufficient

1 knowledge "to excite attention and put a party upon [] guard or
2 call for an inquiry[]"; and (2) if the plaintiff had such
3 knowledge, "it must also appear that a reasonably diligent inquiry
4 would disclose the fraud." *Id.*, 232 Or. App. at 486, 222 P.3d at
5 744 (internal quotation omitted). Although typically a question
6 for the jury, when only one conclusion reasonably can be drawn, the
7 issue is for the court. *Id.*

8 In *Bell*, the plaintiff argued that the defendants defrauded
9 him in the sale of his home when they failed to pay him a certain
10 amount of money upon the closing of the sale. The court found the
11 plaintiff's claim was time-barred because, as a matter of law, the
12 plaintiff was aware at the closing that he did not receive the
13 promised funds, which should have been enough to "excite" his
14 attention, and his suit was filed more than two years after the
15 closing date. *Id.*

16 In the present case, the facts as alleged in the Complaint,
17 along with the relevant documents, show that the plaintiff's claim
18 is time-barred because a jury could reach only one conclusion
19 regarding the events. Although the plaintiff contends the
20 defendant concealed from her that the Trust Deed created a trust
21 and conveyed the property into a trust, the Trust Deed bears the
22 plaintiff's initials on every page, as well as her signature on
23 page eleven. She also signed the Note. She reviewed and signed
24 the loan documents that expressly specified the creation of a trust
25 and the conveyance of the property into the trust on June 8, 2007.

26 The court does not credit as true the plaintiff's conclusory
27 allegations regarding the nature of the documents and their alleged
28 effect. The documents speak for themselves and clearly create a

1 uniform transaction commonly entered into by home buyers. The
2 plaintiff's signature on the documents, while not proof that she
3 actually read them, shows that she was presented with the documents
4 on June 8, 2007. The act of signing those documents should have
5 been enough to "excite" her attention, or cause her to read the
6 documents and inquire about the legitimacy of the documents and
7 their meaning. Moreover, there are no facts suggesting the
8 plaintiff could not have conducted a "reasonably diligent" inquiry
9 at that time into what she alleges was fraudulent conduct by the
10 defendant.

11 The facts as alleged in the Complaint and the accompanying
12 documents show that only one reasonable conclusion can be made
13 regarding the "knew or should have known" inquiry; i.e., the
14 plaintiff knew or should have known on June 8, 2007, of the alleged
15 fraud. Thus, the fraudulent misrepresentation claim filed in this
16 case on August 17, 2010, is untimely.

17 Even if the claim were timely, I agree with the defendant that
18 the plaintiff's claim should be dismissed. Again, the heart of
19 this claim is that the defendant allegedly misled the plaintiff
20 about the fact that the Trust Deed created a trust in which the
21 plaintiff pledged the property to secure the performance of her
22 obligations under the Note. But the alleged "misrepresentation" is
23 belied by the very documents the plaintiff signed. As described
24 above, the Trust Deed explicitly informed her that the property
25 would be put in a trust. The Trust Deed is entitled "DEED OF
26 TRUST" and states in bold and uppercase letters at the very top of
27 the first page that it is a "DEED OF TRUST" which "secures a note."
28 Dkt. #1-1, Ex. B. It defines the Deed of Trust as a "Security

1 Instrument." *Id.* It identifies the plaintiff as the
 2 borrower/trustor, the defendant's predecessor as the lender/
 3 beneficiary, and First America as the trustee. *Id.* It expressly
 4 states that the note signed by the plaintiff on the same date as
 5 the Deed of Trust shows that the plaintiff owed the defendant an
 6 original principal amount of \$460,000, plus accrued and deferred
 7 interest, and she promised to pay the debt in regularly scheduled,
 8 periodic payments as provided in the Note and in full by June 15,
 9 2037. *Id.*

10 The plaintiff expressly granted the property to the Trustee,
 11 in trust for the defendant, with a power of sale. *Id.*, p. 2. She
 12 also expressly agreed to the defendant's right to appoint a
 13 successor trustee of the property. *Id.*, p. 9.

14 The plaintiff does not allege that she did not read the loan
 15 documents, including the Trust Deed. But even if she did, she
 16 cannot avoid enforcement of the contractual obligations by claiming
 17 a failure to read the contract. *See, e.g., Knappenberger v.*
 18 *Cascade Ins. Co.*, 259 Or. 392, 398, 487 P.2d 80, 83 (1971) (party
 19 bound by terms of insurance policy purchased by him even though he
 20 was unaware of those terms because he failed to read the policy);
 21 *DiTommaso Realty, Inc. v. Moak Motorcycles, Inc.*, 96 Or. App. 431,
 22 434, 773 P.2d 391, 392 (1989) (liquidated damages clause in listing
 23 agreement enforceable even if defendant did not read the
 24 agreement). Additionally, any failure by the plaintiff to
 25 understand the terms in the documents does not make the use of
 26 those terms by defendant fraudulent. *See Knappenberger*, 259 Or. at
 27 398, 487 P.2d at 83.

1 The facts alleged in the Complaint, along with Exhibits B and
2 C to the Complaint, fail to allege a plausible claim for fraudulent
3 misrepresentation. I recommend that this claim be dismissed.*
4

5 ***Fraudulent Concealment***

6 In this claim, rather than alleging the defendant affirmatively
7 misrepresented the nature of the loan and Trust Deed documents,
8 the plaintiff contends the defendant purposefully concealed
9 information about the Note and the Trust Deed. The discussion
10 above in connection with the fraudulent misrepresentation claim
11 is equally applicable here. The claim is time-barred because
12 the plaintiff either knew or should have known of any
13 alleged fraud claim based on concealment at the time of closing.
14 Additionally, given that the documents the plaintiff signed at
15 closing state exactly what they are and what they do, she fails to
16 state a claim for fraudulent concealment. Rather than "concealing"
17 their nature, the documents clearly "reveal" what they are. I
18 recommend that this claim be dismissed.

19

20 ***Quiet Title***

21 The plaintiff's quiet title claim is based on her theory that
22 the defendant did not have the right to nonjudicially foreclose on
23 her property because of the defendant's fraudulent conduct. Based
24 on the facts in the Complaint, the exhibits to the Complaint, and
25 the documents I have judicially noticed, this claim has no merit.

26

27 *Given my recommendation, I find it unnecessary to address
28 defendant's Rule 9(b) argument.

1 For all the reasons set forth above, this claim should be
2 dismissed.

3

4 **CONCLUSION**

5 In summary, the plaintiff's Complaint, when considered with
6 the exhibits to the Complaint and the documents submitted by the
7 defendant, fails to meet the standards articulated in *Twombly* and
8 in *Ashcroft v. Iqbal*, ____ U.S. ___, 129 S. Ct. 1937, 1949, 173 L.
9 Ed. 2d 868 (2009). In addressing these two cases, the Ninth
10 Circuit has explained that "for a complaint to survive a motion to
11 dismiss, the non-conclusory factual content and reasonable
12 inferences from that content, must be plausibly suggestive of a
13 claim entitling the plaintiff to relief." *Moss v. United States
14 Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The allegations
15 in the plaintiff's Complaint do not meet that standard. I see no
16 path by which the complaint could be amended successfully. I
17 therefore recommend the defendant's motion to dismiss, Dkt. #3, be
18 granted, and the plaintiff's claims be dismissed with prejudice.

19

20

SCHEDULING ORDER

21 These Findings and Recommendation will be referred to a
22 district judge. Objections, if any, are due by **May 31, 2011**. If
23 no objections are filed, then the Findings and Recommendation will
24 go under advisement on that date.

25

26

27

28

If objections are filed, then a response is due by **June 17, 2011**. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 12th day of May, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge